

W. DOUGLAS SELLERS

IBLA 2000-181

Decided February 5, 2004

Appeal from a decision of the Idaho State Office, Bureau of Land Management, declaring mining claims forfeited by operation of law because claimant did not qualify for waiver of the annual \$100 per claim maintenance fee and the fee was not paid for the 1997 through 1999 assessment years. IMC 101860 through IMC 101862, IMC 101864 through IMC 101866, IMC 101868, IMC 101869, IMC 101873, and IMC 101877.

Reversed.

1. Mining Claims: Rental or Claim Maintenance Fees:
Generally--Mining Claims: Rental or Claim Maintenance
Fees: Small Miner Exemption

Prior to the assessment year for which a maintenance fee waiver is sought, a claimant must certify that it and related parties do not hold in aggregate more than 10 claims. Under 30 U.S.C. § 28f(d) (2000), a party is deemed related where it controls, is controlled by, or is under common control with the claimant. The mere fact that an individual claimant is also one of several directors of a company that holds mining claims is insufficient to establish that the corporation is a related party. The exercise of control must be evaluated to determine whether an individual who personally holds mining claims and acts as a director of a company is in violation of the 10-claim limit. Where an individual is only one of several directors, and cannot, acting alone, control the company's claims, a decision to aggregate the company's claims so

that he is deemed in violation of the 10-claim limit must be reversed.

3MRC-Co., 146 IBLA 6 (1998), distinguished.

APPEARANCES: W. Doug Sellers, Cottonwood, Idaho, pro se.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

W. Douglas Sellers (Sellers or appellant) has appealed from a February 11, 2000, decision of the Idaho State Office, Bureau of Land Management (BLM), declaring the Sinker #1-#3, #5-#7, #9, #10, #14, and #18 mining claims (IMC 101860 through IMC 101862, IMC 101864 through IMC 101866, IMC 101868, IMC 101869, IMC 101873, and IMC 101877) forfeited by operation of law because Sellers did not qualify for the waiver of the annual \$100 per claim maintenance fee for which he had applied and the fee was not paid for the 1997 through 1999 assessment years.

Under 30 U.S.C. § 28f(a) (1994), Congress has required the holder of each unpatented mining claim, mill or tunnel site to pay a claim maintenance fee of \$100 to the Secretary of the Interior on or before August 31 of each year for years 1994 through 1998. Failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law.” 30 U.S.C. § 28i (1994). The Secretary, however, has discretion to waive the fee for a small miner who holds not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands and has performed assessment work required under the Mining Law. 30 U.S.C. § 28f(d)(1) (1994). For assessment years 1999-2001, a claimant was required to file a waiver certification on or before September 1 of the calendar year the certification is due, through September 1, 2002. 43 CFR 3833.1-7(d) (1999).

In its decision, BLM rejected Sellers' waiver certifications, explaining as follows:

In order to qualify for a small miner waiver, Federal regulations at 43 CFR 3833.1-6(a)(1) require that the claimant and all related parties * * * hold no more than ten mining claims, mill sites, and tunnel sites on Federal lands in the United States on the date the payment is due. All mining claims and sites held by a claimant and all related parties are counted toward the 10 claim and site limit. 43 CFR 3833.1-6(a)(2).

“Related parties” is defined as a person who controls, or is controlled by, or is under common control with the claimant. 43 CFR 3833.0-5(x)(2). “Control” is defined as actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, a voting trust, or a holding company or investment company, or any other means. 43 CFR 3833.0-5(y).

A review of the Idaho Corporation Annual Report Forms filed with Idaho's Secretary of State in 1995 through 1998 for Idaho Mining and Development Company shows that you have been a director of that corporation each of those years. * * * When a corporation owns an interest in mining claims, those claims are properly counted toward the 10-claim limit for individuals who are *officers and directors* of the corporation. See 3MRC-Co. Inc., 146 IBLA 6 (1998).

Because you and Idaho Mining and Development Co. are related parties and, in aggregate, hold in excess of ten mining claims, you were and are ineligible for a “small miner waiver” from the mandatory \$100 maintenance fee requirement. (Emphasis in original.)

BLM then concluded: “Because you failed to pay the maintenance fee and did not qualify for a waiver of fees on or before August 31, for the 1997-1999 assessment years, the unpatented mining claims * * * are forfeited by operation of law, as of August 31, 1996.” (Emphasis in original.)

In his statement of reasons (SOR), Sellers contends that this issue was determined by BLM on April 12, 1995, when, in a meeting on that day “Lynn McClure of the Boise BLM assured those present that a director of Idaho Mining and Development Co., who does not hold the office of president or secretary, that his claim ownership via the Small Miner's Exemption would remain intact * * *.” (SOR at 2.) (Emphasis in original.) Appellant argues that this agreement is a contract and cannot be voided by BLM because he has continued in good faith to meet the requirements for a maintenance fee waiver. Sellers contends that his intent to hold only ten mining claims is clear.

In support of that argument, appellant's SOR refers to two documents, a BLM note signed and dated April 12, 1995, memorializing the meeting on the ten claim issue and an April 13, 1995, letter to BLM purportedly relating the position of BLM in reference to officers of corporations holding mining claims. These documents were to be attached as exhibits to appellant's SOR, but are not in the record before us. (Neither the original filed with BLM nor the copy sent to the Board includes the

exhibits.) We find, however, sufficient reason in the records which have been received to reverse BLM's determination.

[1] In subsection 1 of 30 U.S.C. § 28f(d) (2000), Congress grants the Department authority to waive the claim maintenance fee for a claimant who certifies that “the claimant and all related parties * * * held not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands.” (Emphasis added.) In subsection 2 of section 28f(d), Congress defined “related party” as follows:

For purposes of paragraph (1), with respect to any claimant, the term “related party” means--

(A) the spouse and dependent children (as defined in section 152 of Title 26) of the claimant; and

(B) a person who controls, is controlled by, or is under common control with the claimant,

For purposes of this section, the term control includes actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, a voting trust, or a holding company or investment company, or any other means.

The regulations implementing this statute were 43 CFR 3833.0-5(x) and (y) (2000):

(x) *Related party* means:

(1) The spouse and dependent children of the claimant as defined in section 152 of the Internal Revenue Code of 1986, or

(2) A person who controls, is controlled by, or is under common control with the claimant.

(y) *Control* means, as defined in the Act of August 10, 1993, actual control, legal control, and the power to exercise control, through or by common directors, officers, stockholders, a voting trust, or a holding company or investment company, or any other means.

We have reviewed BLM's application of these provisions in three cases: Black Bear Mines Co., 152 IBLA 387, 395 (2000); Silver Crystal Mines, 147 IBLA 146

(1999); and Richard W. Cahoon Family Limited Partnership, 139 IBLA 323 (1997). However, in none of those cases did we address whether maintenance fee statutes and regulations impute a corporation's mining claims to an individual serving on the corporation's board of directors. Applying the statutory and regulatory definitions to our facts, the question becomes whether Idaho Mining & Development Company (Idaho Mining), the potential related party, is controlled by Sellers, the claimant seeking a waiver. See 30 U.S.C. § 28f(d)(2)(B) (2000); 43 CFR 3833.0-5(x)(2) (2000).

In Richard W. Cahoon Family Limited Partnership, supra, the Board focused on a partnership and concluded that the term "related parties," as set forth in the statute, may include general partners who can exercise "control" or limited partners who are "under common control with" a person who holds the right to transfer claims held by the partnership. 139 IBLA at 325-26. The Board ruled that the partnership failed to qualify for the small miner waiver, since the quitclaim deeds by which the individual partners conveyed their interest to the partnership resulted in that entity holding more than 10 claims. The Board stated that "[w]here a partnership as an entity is qualified to own claims, a partnership that owns more than 10 claims cannot qualify for the small miner exemption." Id. at 325 (footnote omitted.) Further, the Board stated that "the term 'related parties' may include a general partner who can exercise 'control' or limited partners who are 'under common control with' a person who holds the right to transfer the claim." Id. This case does not apply to the question now before the Board, which is whether ownership of mining claims held by a corporation can be imputed to one of its five directors.

In Silver Crystal Mines, supra, we reviewed mining claims held void for failure to pay rental fees in 1993 and maintenance fees in 1995. We held that neither the statute imposing rental fees nor its implementing regulations provided a basis for imputing to the corporation ownership of claims owned by an officer of the corporation as an individual. We reversed BLM's decision to the extent that it had determined that the corporation was imputed to have an interest in an officer's personal claims based upon the rental fee statute and regulations. Id. at 151. The Board therefore remanded to BLM the maintenance fees issue to determine the corporation's eligibility for a waiver of maintenance fees due in 1995, based upon the fact that BLM's reference to the officer's relationship with other corporations was dependent on several mining claims held by those companies which had been voided in 1993. Id. at 152. Hence, the extent to which corporations are held responsible for other corporations' mining claims because they have corporate officers in common was not expressly addressed. Moreover, we did not address whether the maintenance fee legislation and regulations provide a basis for imputing the

corporation's mining claims to an individual serving as an officer or director of that or another corporation.

In Black Bear Mines Co., *supra*, the Board reviewed waiver certifications filed by 45 corporations and addressed whether the corporations were deemed related due to common directors and officers. 152 IBLA at 388. We found from the certifications of incorporation included in the record that BLM had correctly determined that all 45 companies were related, as that term is defined by the statute and regulations, to at least one other company. In each instance, no less than 50 percent of a company's directors or officers were found to comprise no less than 50 percent of another company's directors or officers. *Id.* at 399. The record indicated that the corporate boards were "saturated" with overlapping officers and directors. *Id.* at 396. Again, the fact that "[i]n each instance, no less than 50 percent of the company's directors or officers were found to comprise no less than 50 percent of another company's directors or officers" was central to our decision. *Id.* We ruled that this situation resulted in related companies holding in aggregate more than 10 mining claims. Again, we did not address whether the maintenance fee legislation and regulations impute the corporation's mining claims to an individual serving as an officer or director.

BLM relies upon our decision in 3MRC-Co., 146 IBLA 6 (1998), to justify its conclusion that Idaho Mining was a party related to Sellers. Therein, a plurality of the Board construed narrowly the notion of control, as follows:

In our view, it would not be reasonable to interpret "have an interest in these entities" in 43 C.F.R. 3833.1-6(a)(3) as tantamount to having any interest. Nor does it appear from the responses to the comments that BLM intended such a broad application. Although the responses may not be fully consonant, it appears BLM intended that a corporation could hold 10 or fewer claims and an individual stockholder of that corporation could hold 10 or fewer claims and both could qualify for an exemption so long as the individual stockholder did not "control" the corporation. This is how we understand the responses that "any person who owns stock in a mining corporation which holds claims" is "separately eligible for the small miner exemption" (comment one above) if the person is a stockholder "without control" (comment two). "The clear intent of the Act was to exempt all claimants, including corporations, holding 10 claims or fewer (comment two). In a different context, BLM responded to a comment questioning "whether a person who is part of a corporation * * * that qualifies for a 10-claim

exemption can also qualify for an additional small miner exemption under his or her own name” with the answer “yes if the person is a non-controlling shareholder of a corporation.” 58 Fed. Reg. 38186, 38193 (July 15, 1993).

Id. at 10.

Our review of 3MRC-Co. was based upon the regulation then in effect implementing the rental fee requirements, 43 CFR 3833.1-6(a)(3) (1993), which read: “Mining claims held in co-ownership, or by an association of locators, by a partnership, or by a corporation shall be counted toward the 10-claim limit for claimants that have an interest in these entities.” (Emphasis added.) As noted in 3MRC-Co., supra at 10-11, and again in Silver Crystal Mines, supra at 150, the policy applied was regulatory, and not statutory, and the Board looked to the Department’s rulemaking to determine the effects and extent of “control.” In 3MRC-Co., supra at 11, the lead opinion stated: “Owning a controlling number of shares in a corporation would be sufficient for an individual to have control, i.e., to have an interest in the corporation. Being an officer or director of a corporation would also be sufficient to raise a rebuttable presumption of control.” The lead opinion then concluded: “[I]t is clear that 3MRC-Co. Inc.’s 10 claims must be counted toward the 10-claim limit for Goodell and Prudden, who are both officers and directors of the corporation and therefore have an interest in it.” Id.

In our view, BLM’s reliance on 3MRC-Co. is misplaced. Both the relevant statutes and regulations have changed since the decision on appeal in 3MRC-Co. was issued. The focus in 3MRC-Co. was upon whether an individual who was a corporate officer and director had an “interest” in the corporation. 3MRC-Co., supra at 11. The level of control that was used to demonstrate an “interest” under the former rental fee waiver regulation is not necessarily the same as the control needed to qualify as a “related party” under 30 U.S.C. § 28f(d)(2), the applicable maintenance fee waiver statute. Thus, the presumption in 3MRC-Co. relative to showing the existence of a personal “interest” does not automatically or seamlessly translate into a valid presumption for showing control as it is defined by the current statute and regulations.

The U.S. Court of Appeals for the D.C. Circuit has invalidated a similar presumption of control that applied to the officers and directors of surface mining companies. In National Mining Ass’n v. U.S. Dep’t of the Interior, 177 F.3d 1 (D.C. Cir. 1999), the D.C. Circuit addressed the presumption found in 30 CFR 773.5(b) (1999), which “presumes” ownership or control from certain relations between the applicant for a permit and a downstream entity, “unless a person could

demonstrate that the person subject to the presumption did not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operations were conducted.” Under subsection (1) of 30 CFR 773.5(b), the rebuttable presumption would apply to a person who is an officer or director of a company. The D.C. Circuit ruled that the presumptions promulgated at 30 CFR 773.5(b)(1) and (5) ^{1/} were invalid because the relationships identified did not sufficiently indicate ownership or control.

Pertinent to this discussion, the D.C. Circuit found the rebuttable presumption under subsection (1) untenable, reasoning as follows:

In reviewing regulatory presumptions we must defer to the agency’s judgment, *see, Atchison, Topeka & Santa Fe v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978), but “an evidentiary presumption is ‘only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it,’” *NMA v. Babbitt*, 172 F.3d 906, 911-12 (D.C. Cir. 1999) (quoting *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1100-01 (D.C. Cir. 1998) (internal quotations omitted) (alterations in original)). “If there is an alternate explanation for the evidence that is also reasonably likely, then the presumption is irrational.’” *Id.* at 912 (quoting *Keystone Coal Mining Corp.*, 151 F.3d at 1101). The presumptions enumerated in subsections (1) and (5) fail this test because the relationships identified in them do not sufficiently indicate ownership or control. Being an officer or director does not by itself enable an entity to control the company or its operations, as subsection (1) presumes. *See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations* § 1.08(a)(c) (Proposed Final Draft 1992) (“A person is not in control of a business organization solely because the person is a director or principal manager of the organization”); Louis Loss & Joel Seligman,

^{1/} The rebuttable presumption embodied in subsection (5) of 30 CFR 773.5(b) applied to a person who owned 10 to 50 per cent of the stock of an entity. The D.C. Circuit found this rebuttable presumption invalid on the basis that OSM had offered no rationale for concluding that “an owner of as little as 10 per cent of a company’s stock controls it. While ten percent ownership may, under specific circumstances, confer control, OSM has cited no authority for the proposition that it is ordinarily likely to do so.” *National Mining Ass’n v. Dep’t of the Interior*, *supra* at 7.

Securities Regulation, 1724 & n.46 (3d ed. 1990) (“[A] person’s being an officer or director does not create any presumption of control.”) (emphasis in original); Burgess v. Premier Corp. 727 F.2d 826, 832 (9th Cir. 1984) (“A director ‘is not automatically liable as a controlling person. There must be some showing of actual participation in the corporation’s operation or some influence before the consequences of control may be imposed.’”) (interpreting section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; quoting Herm v. Stafford, 663 F.2d 669, 684 (6th Cir. 1981); citing Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187, 194-95 (5th Cir. 1979), modified, 611 F.2d 105 (5th Cir. 1980) (per curiam)).

National Mining Ass’n v. U.S. Dep’t of the Interior, *supra* at 6.

We conclude that under the applicable statute and implementing regulations, the mere fact that Sellers is one of five directors does not, without more, demonstrate that he controls Idaho Mining. Although the board of directors, as an entity, has control over the corporation, nothing in the record suggests that Sellers alone can control the board’s actions. Thus, the “interest” related presumption of control for officers and directors discussed in 3MRC-Co. has no application to the present case. The record before us includes nothing apart from Sellers’ status as one of five board members to indicate that he personally has actual control, legal control, or the power to exercise control over Idaho Mining. Because Sellers’ status as a corporate director is insufficient on its own to demonstrate control of Idaho Mining, we find error in BLM’s determination. Further, we conclude that BLM’s interpretation of its current regulation is inconsistent with the reasoning in National Mining Ass’n v. U.S. Dep’t of the Interior, *supra*.

When Congress established the payment of maintenance fees in lieu of its previous experiment with rental fees, it chose to grant the Secretary of the Interior the discretionary authority to provide for the waiver of required maintenance fees for those holding 10 or fewer claims if such a waiver was deemed desirable. See Alamo Ranch Co., 135 IBLA 61, 75 (1996); see also Goldie James, 143 IBLA 289, 292-93 (1998). Thus, the Department’s authority with respect to waivers is constrained only by such express limitations as are found in the legislative grant. We find that one of the essential differences between the maintenance fee statute and the rental fee legislation which it replaced is that Congress expressly provided that, with respect to determining related parties, “the term control includes actual control, legal control, or the power to exercise control, through or by common directors, officers, * * *.” (Emphasis added.) 30 U.S.C. § 28f(d) (2) (1994). It appears evident that there is no

rebuttable presumption of control under the maintenance fee statute, and the holding in 3MRC-Co. is, thus, distinguishable.

We hold that being one of five directors who would vote on matters pertaining to the company is not enough to infer that he has control over the claims held by the company. Without more evidence than this, we cannot reasonably conclude that Sellers possesses “actual control, legal control, or the power to exercise control” of Idaho Mining’s business affairs. We therefore find error in BLM’s determination on this basis. See National Mining Ass’n v. U.S. Dep’t of the Interior, supra at 6.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

James F. Roberts
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge